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Supreme Court of the United States

October Term, 1943

No. 567

THE WHOLESALE DRY GOODS INSTITUTE, INC., ET AL.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

PETITION 1

Summary Statement of Matters Involved 1

Action of the Circuit Court of Appeals 3

Jurisdiction of this Court 4

Statute Involved 5

Petitioners' Contentions 5

Questions Presented 6

Reasons Relied Upon for the Allowance of the Writ 7

BRIEF IN SUPPORT OF PETITION 9

POINT I—The defendants, we respectfully submit, were not accorded a fair trial.

They were prevented from showing that their acts had neither the intent, nor the effect, nor the power, to constitute the unfair methods of competition charged.

Moreover, they were concluded by the erroneous theory of law that because information as to fraudulent, immoral, illegal or discriminatory practices might influence someone's decision as to a person with whom not to trade, a combination to gather and disseminate such information among its members was unfair competition and an illegal restraint of trade 9

POINT II—The Circuit Court misinterpreted and misapplied *Eastern States Lumber Assn.* v. *U. S.*, 234 U. S. 600, the authority upon which it purported to act in sustaining the Federal Trade Commission's order 16

PAGE

POINT III—The Circuit Court's misinterpretation of the doctrine of *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, which fully justifies the defendants' action here, aside from resulting in a denial of a fair trial, has or will produce a conflict and confusion, having grave public consequences, as to the status of this Court's decisions, with respect to the rights of industry to cooperate for its own protection against unethical or illegal competition and unlawful trade practices 19

POINT IV—Moreover, the Circuit Court's decision is also in conflict with the decision of this Court in *Maple Flooring Assn.* v. *U. S.*, 268 U. S. 563 21

APPENDIX—Opinion of Circuit Court of Appeals 24

Table of Cases Cited

PAGE

Appalachian Coals, Inc. v. U. S., 288 U. S. 344 ... 3, 13, 19, 20

Board of Trade of the City of Chicago v. U. S., 246 U. S. 231 ... 13

Butterick Publishing Co. v. F. T. C., 85 F. (2d) 522 ... 13

Cement Manufacturers Protective Assn. v. U. S., 268 U. S. 588 ... 3, 11, 15, 21

Eastern States Lumber Assn. v. U. S., 234 U. S. 600 ... 3, 7, 8, 16, 17, 24

Fashion Originators Guild v. F. T. C., 312 U. S. 457 ... 18

Fresh Grown Preserve Corp. v. F. T. C., 125 F. (2d) 917 ... 15

L. & C. Mayers Co., Inc. v. F. T. C., 97 F. (2d) 365 ... 15

Maple Flooring Assn. v. U. S. 268 U. S. 563 ... 3, 17, 21

Millinery Creators Guild v F. T. C., 109 F. (2d) 175, aff'd 312 U. S. 469 ... 14, 18, 19

N. R. L. B. v. Indiana & Michigan Electric Co., 318 U. S. (1943) ... 15

Sugar Institute v. U. S., 297 U. S. 553 ... 15, 20

Swift & Co. v. U. S. 196 U. S. 375 ... 11

U. S. v. American Livestock Commission, 279 U. S. 439 ... 14

Table of Statutes Cited

Federal Trade Commission Act, c. 311, 38 Stat. 717 (15 U. S. C., Secs. 41 *et seq.*) ... 4, 5, 9

Judicial Code, Sec. 240(a), Title 28, U. S. C., Sec 347 ... 4

The Clayton Act as amended by the Robinson-Patman Act, Sec. 2(a) (15 U. S. C. A., sec. 13) ... 10, 11

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against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved

Respondent, Federal Trade Commission, issued an order on November 24, 1941, directing the Wholesale Dry Goods Institute, Inc., its officers, directors and members, the Petitioners herein, to cease and desist from certain alleged violations of Section 5 of the Federal Trade Commission Act.

The order of the Commission declared (fols. 982 *et seq.*):

> (1) The Institute, its officers, directors and members were guilty of unfair methods of competition within the meaning of the Federal Trade Commission Act.

(2) The complaint was dismissed as to seven of the original respondent concerns.

(3) The motion of the present petitioners to have certain evidence received and considered was denied.

The Institute is a membership corporation organized under the laws of New York in November, 1928. The program of the Institute was as follows:

(1) The gathering and dissemination among the Institute's members of a list of manufacturers classified according to which of several mill selling policies they followed (C. Ex. 53); and,

(2) The dissemination among members and classified manufacturers of a list of "wholesalers" in the dry goods business, according to the Institute's definition of that term (C. Ex. 16).

The information service as to mill selling policies was begun by the Institute in 1930. It grew out of a report of a "Differential Committee" (R. Ex. 122), and is explained in the "Confidential Report on Mill Selling Policies" (C. Ex. 53). Mills which discriminated against wholesalers and retailers generally by giving to certain retailers the price accorded to wholesalers received a classification different from that accorded to manufacturers who confined such price level to its true economic wholesale function.

The Institute adopted a definition of a "wholesaler" of dry goods which was included in the Report on Mill Selling Policies, and which corresponded to the accepted meaning of the term; and in 1935 the information service as to wholesalers was begun by the preparation and dissemination of a list of firms conforming to that definition. This list became known as the Directory (C. Ex. 16). The Directory included any wholesaler of dry goods whether or not they were members of the Institute. In 1935 the list numbered 1400 of which 213 were members of the

Institute (C. Ex. 16). In 1939 the list numbered 1147 wholesalers of which 126 were members of the Institute (C. Ex. 17).

The Institute offered to prove that sales by its members amounted to not more than 8.05% of the total volume of sales to retailers of drygoods and kindred lines throughout the industry; but this offer was rejected as irrelevant, —erroneously, we claim (fols. 5325-31).

The Federal Trade Commission made findings that these information services were sufficient to infer the existence of an agreement among wholesalers to refrain from buying from manufacturers of low classification and to restrain manufacturers from selling to firms not listed as "wholesalers" in the Institute's Directory (fols. 841 *et seq.*).

Action of the Circuit Court of Appeals

The Circuit Court of Appeals affirmed, with an Opinion *per curiam*, printed in the Appendix hereto.

That Opinion predicates itself on the Court's interpretation of *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, in relation to the subsequent decisions in

Maple Flooring Association v. *United States*, 268 U. S. 563;

Cement Manufacturers Protective Association v. *United States*, 268 U. S. 588;

Appalachian Coals, Inc. v. *United States*, 288 U. S. 344.

The Court's conclusion as to the basic law of the instant case was that these later decisions in no way affected the *Eastern States* decision, and that

> "Nothing which has followed has qualified that ruling; it remains true, now as it was then, that such a combination is unlawful no matter how pressing may be the evils which it is designed to correct, and which indeed it may in fact correct; as in the case of the combination to fix prices, nothing will justify it. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150."

Evidence of the purpose, background and operation of the services described above and of the evils, illegalities and discriminations against which they were directed, was refused by the Commission as irrelevant to the issues involved (fols. 5185-94, 5497-5507). This refusal was assigned as error to the Circuit Court of Appeals, but that Court failed to consider the assignment of error in its opinion.

Evidence as to the character and background of the hybrid concerns masquerading as wholesalers was also refused by the Commission as irrelevant (fols. 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615). This refusal was assigned as error to the Circuit Court of Appeals, but again that Court failed to consider the assignment of error in its opinion.

Jurisdiction of this Court

The decree of the Circuit Court of Appeals was entered on December 2, 1943 (R. p. ~~1317~~ 1891).

The jurisdiction of this Court rests upon Sec. 5 of the Federal Trade Commission Act (15 U. S. C., Sec. 45) and Sec. 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

Statute Involved

The primary statute involved is the Act of September 26, 1914, c. 311, 38 Stat. 717 (15 U. S. C., Secs. 41, *et seq.*), known as the Federal Trade Commission Act. The pertinent provisions of this Act at the time the Commission issued this order are:

> Sec. 5 (a)—"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Petitioners' Contentions

It was and is the contention of the Institute and its members that the dissemination of the information as to mill selling policies and as to being actual wholesalers was not illegal or unfair, but was itself a legitimate defensive measure against practices which were themselves unfair and illegal; and that the petitioners should have been given full opportunity to prove that the program of the Institute was an information service issued for defensive purposes and was not a concerted combination to boycott or blacklist any one.

The petitioners contend that such few instances as the record contains of failure by manufacturers to sell in certain individual cases after receipt of information that a specific customer was not in fact a wholesaler, represented merely a voluntary choice and decision, and constituted no evidence of any agreement to restrain or coerce any one. Of course competition based on enlightenment will manifest some choices of customers which would not have been made in competition based on ignorance.

Questions Presented

We respectfully claim that:

(1) The Commission and the Court below have implicitly adopted the erroneous but far-reaching theory of law that it is an unfair trade practice and an illegal restraint for wholesalers as a measure of self-defense against fraudulent, unethical, illegal or discriminatory practice to gather and disseminate to manufacturers information as to whether a given buyer is masquerading as a wholesaler to gain an unfair commercial advantage for himself.

(2) The Commission and the Court below have also implicitly adopted the erroneous but far-reaching theory of law that it is an unfair trade practice and an illegal restraint for wholesalers to gather and disseminate information as to selling policies of manufacturers, since such information may lead some wholesalers to decide not to buy from manufacturers who were covertly discriminating against wholesalers and subsidizing certain retailers as competitors of wholesalers by according them the wholesalers' differential.

(3) The Commission and the Court below have also implicitly adopted the erroneous but far-reaching theory of law that the basic finding of a combination "not to buy of manufacturers who dealt with retailers on the same terms on which they dealt with wholesalers", can be sustained by inference from generalities without any evidence of a single instance of loss of member business by any manufacturer.

(4) As a result of these erroneous theories of law, the Commission made at the trial basic and highly prejudicial errors which deprived the defendants of a fair trial by refusing them the right to prove facts

relevant to their case and to present all available defenses.

(5) As a result of the same erroneous theories of law, the Commission failed and refused to make findings of fact as to the actuality of the trade frauds and duplicities against which the program of the Institute was directed.

Reasons Relied Upon for the Allowance of the Writ

This case presents matters of great public importance relating to permissible boundaries of action by trade associations in measures of self-defense against fraudulent, unethical or illegal practices.

It is serious indeed if it be the law, as announced by the Circuit Court of Appeals, that a combination to gather and disseminate to its members information relative to practices which are fraudulent, immoral, unethical, discriminatory or illegal is unfair or illegal "no matter how pressing may be the evils which it is designed to correct, and which indeed it may correct."

It is even more serious if it be the law, as announced by the Circuit Court of Appeals, that such a combination is analogous to "the case of the combination to fix prices, nothing will justify it."

The ruling made by the Circuit Court of Appeals that the *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, compels such theories of law and condemns all that was done here, is an extreme and unwarranted interpretation and application, and is, we submit, in conflict with applicable decisions of this Court discussed hereafter.

The ruling made by the Circuit Court of Appeals that these subsequent decisions of this Court, upholding the right of an industry or trade group to self-enlightenment as to fraudulent, immoral, unethical or illegal practices, are not qualifications of the principles which the Court of

Appeals says it finds in the *Eastern States* case, cannot be sustained.

The consequences of the decisions below are that an industry or trade group can look only to the government for protection from fraudulent, immoral, unethical or illegal practices, and can obtain only from the government or by the individual effort of individual members, information as to facts pertinent to the preservation of honest and enlightened competition.

If it is unfair or illegal to warn of pretense lest the pretenders lose business, then free enterprise becomes enslaved to ignorance, and competition becomes mere strife in the dark.

WHEREFORE, the petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the said order of the Federal Trade Commission be reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, December 29, 1943.

THE WHOLESALE DRYGOODS INSTITUTE, INC., *et al.*,
Petitioners.

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